



DEPARTMENT OF COMMERCE

Patent and Trademark Office

LIBRARY OF CONGRESS

United States Copyright Office

[Docket No.: PTO-C-2022-0035]

Study on Non-fungible Tokens and Related Intellectual Property Law Issues

AGENCY: United States Patent and Trademark Office, Department of Commerce; United States Copyright Office, Library of Congress.

ACTION: Notice of inquiry; notice of public roundtables.

SUMMARY: The United States Patent and Trademark Office (USPTO) and the United States Copyright Office (USCO) (collectively, the Offices) are conducting a joint study regarding issues of intellectual property (IP) law and policy associated with non-fungible tokens (NFTs). The Offices seek public comments on these matters to assist in their work on IP policy related to NFTs and in conducting the study. In addition, the Offices are announcing a series of three public roundtables to allow them to gather further input.

DATES: *Written comments:* Public comments must be received no later than 11:59 p.m. Eastern Time on [INSERT DATE 45 DAYS AFTER PUBLICATION OF FEDERAL REGISTER NOTICE].

Public roundtables: Roundtable 1: Patents and NFTs. Roundtable 1 will be held on Tuesday, January 10, 2023. Requests to participate as a panelist must be received by 11:59 p.m. Eastern Time on [INSERT DATE 28 DAYS AFTER PUBLICATION OF FEDERAL REGISTER NOTICE].

Roundtable 2: Trademarks and NFTs. Roundtable 2 will be held on Thursday, January 12, 2023. Requests to participate as a panelist must be received by 11:59 p.m. Eastern

Time on [INSERT DATE 28 DAYS AFTER PUBLICATION OF FEDERAL REGISTER NOTICE].

Roundtable 3: Copyright and NFTs. Roundtable 3 will be held on Wednesday, January 18, 2023. Requests to participate as a panelist must be received by 11:59 p.m. Eastern Time on [INSERT DATE 28 DAYS AFTER PUBLICATION OF FEDERAL REGISTER NOTICE].

ADDRESSES: *Submission of written comments:* For reasons of Government efficiency, comments must be submitted through the Federal eRulemaking Portal at www.regulations.gov. To submit comments via the portal, enter docket number PTO-C-2022-0035 on the homepage and click “Search.” The site will provide a search results page listing all documents associated with this docket. Find a reference to this request for information and click on the “Comment Now!” icon, complete the required fields, and enter or attach your comments. Attachments to electronic comments will be accepted in ADOBE® portable document format (PDF) or MICROSOFT WORD® format. Because comments will be made available for public inspection, information that the submitter does not desire to make public, such as an address or phone number, should not be included. Visit the Federal eRulemaking Portal for additional instructions on providing comments via the portal. If electronic submission of comments is not feasible due to a lack of access to a computer and/or the internet, please contact the Offices using the contact information below for special instructions on how to submit comments by other means.

Submission of business confidential information: Any submissions containing business confidential information must be marked “confidential treatment requested” and submitted through the Federal eRulemaking Portal. Submitters should provide an index listing the document(s) or information they would like the Offices to withhold. The index should identify the confidential document(s) by document number(s) and document

title(s) and should identify the confidential information by description(s) and relevant page number(s) and/or section number(s) within a document. Submitters should provide a statement explaining their grounds for requesting non-disclosure of the information to the public as well. The Offices also request that submitters of business confidential information include a non-confidential version (either redacted or summarized) that will be posted on www.regulations.gov and available for public viewing. In the event that the submitter cannot provide a non-confidential version of their submission, the Offices request that the submitter post a notice in the docket stating that they have provided the Offices with business confidential information. Should a submitter fail either to docket a non-confidential version of their submission or to post a notice that they have provided business confidential information, the Offices will note the receipt of the submission on the docket with the submitter's organization or name (to the degree permitted by law) and the date of submission.

Anonymous submissions: The Offices will accept anonymous submissions. Enter "N/A" in the required fields if you wish to remain anonymous.

Public roundtables: The roundtables will be conducted virtually. Roundtable 1 (patents) and Roundtable 2 (trademarks) will be conducted using the Webex videoconferencing platform. Roundtable 3 (copyright) will be conducted using the Zoom videoconferencing platform. Requests to participate as a panelist at one or more of these roundtables must be submitted via email to NFTStudySpeakingRequests@uspto.gov and must be received by the dates listed above (at **DATES**). Requests to participate as a panelist at a roundtable made in any other form, including as part of comments submitted via the Federal eRulemaking Portal, will not be considered. If email submission of requests to participate as a panelist is not feasible, please contact the Offices using the contact information below for special instructions. The submission of written comments in response to this notice is not a prerequisite to participation as a panelist in a roundtable. Please note that

the Offices will review all requests to participate and will endeavor to invite participants representing diverse viewpoints on the subject matter discussed at each roundtable. The Offices may not be able to accommodate all requests.

FOR FURTHER INFORMATION CONTACT: Kevin R. Amer, Senior Level Attorney, USPTO, kevin.amer@uspto.gov, 571-272-9300; Branden Ritchie, Senior Level Attorney, USPTO, branden.ritchie@uspto.gov, 571-272-9300; Andrew Foglia, Senior Counsel, USCO, afoglia@copyright.gov, 202-707-8350; or Jenée Iyer, Counsel, USCO, jiyer@copyright.gov, 202-707-8350.

SUPPLEMENTARY INFORMATION: The USPTO and the USCO have been consulting with stakeholders and working on both U.S. and international policy relating to emerging technologies, such as NFTs. These efforts have been collaborative, and each office also engages in its own activities impacting its respective responsibilities. For example, USPTO’s work in this area is being done as part of the USPTO’s AI and Emerging Technology Partnership, see <https://www.uspto.gov/initiatives/artificial-intelligence/ai-and-emerging-technology-partnership-engagement-and-events>, and as part of separate consultations and collaborations. The USCO continues to examine copyright issues arising from emerging technologies such as NFTs, software-enabled devices, and artificial intelligence. On June 9, 2022, Senators Patrick Leahy and Thom Tillis sent a letter to the USPTO and the USCO requesting that the Offices conduct a joint study addressing various IP law and policy issues associated with NFTs. The letter urged the Offices to “consult with the private sector, drawing from the technological, creative, and academic sectors.” USPTO and USCO responded on July 8, 2022, stating that “we will indeed conduct the study.” The Senators’ letter, and the agencies’ response, is at <https://www.copyright.gov/laws/hearings/response-to-june-9-2022-letter.pdf>.

In furtherance of the study and consultations, the Offices request public comments on the questions provided below. Commenters need not respond to every question and may provide comments that are relevant to the subject matter of this study but that are not encompassed by the questions. Following the close of the public comment period, the Offices will hold a series of three public roundtables to allow members of the public to provide further input.

I. Topics for Public Comment

Note Regarding the Use of the Term “NFT”: Merriam-Webster defines “non-fungible token” and “NFT” as “a unique digital identifier that cannot be copied, substituted, or subdivided, that is recorded in a blockchain, and that is used to certify authenticity and ownership (as of a specific digital asset and specific rights relating to it).”¹ The terms “NFT” and “NFTs” in the questions below should be read consistently with this general definition. Accordingly, for purposes of the questions below, the terms “NFT” and “NFTs” do not refer to the underlying asset,² but rather to the unique identifier.

To the extent that your responses contemplate a definition different from the Merriam-Webster definition, please provide your definition before answering the questions, and explain how it is relevant to your answers.

Questions for Public Comment: The Offices welcome comments from members of the public on any issues relevant to the subject matter of this study, and are particularly interested in answers to the following questions. To the extent practicable, in your written response, please identify which questions you are answering.

¹ Merriam-Webster. (n.d.). NFT. Merriam-Webster.com dictionary, available at www.merriam-webster.com/dictionary/NFT.

² The Offices here use the word “asset” broadly and take no position on its meaning in the context of NFTs in other bodies of law.

1. Please describe:
 - a. The current uses of NFTs in your field or industry, including the types of assets associated with NFTs (e.g., digital assets, physical goods, services); and
 - b. Potential future applications of NFTs in your field or industry, including the types of assets that could be associated with NFTs (e.g., digital assets, physical goods, services).
2. Please describe any IP-related challenges or opportunities associated with NFTs or NFT markets.
3. Please describe how NFT markets affect the production of materials subject to IP protection.
4. Please describe whether, how, and to what extent NFTs are used by or could be used by IP rights holders (including those who hold trademarks, patents, and/or copyrights) to:
 - a. Document the authenticity of an asset;
 - b. Document the seller's ownership of or authority to sell an asset;
 - c. Document the seller's authority to transfer any relevant or necessary IP rights associated with an asset; and
 - d. Document any limitations related to IP rights surrounding the sale, or the purchaser's use, of an asset.
5. Please describe whether, how, and to what extent NFTs present challenges for IP rights holders, or those who sell assets using NFTs, with respect to the activities described in Question 4 above.

6. Please describe whether, how, and to what extent NFTs are used by, could be used by, or present challenges or opportunities for IP rights holders (including those who hold trademarks, patents, and/or copyrights) to:
 - a. Obtain their IP rights;
 - b. Transfer or license their IP rights;
 - c. Exercise overall control and management of their IP rights (e.g., digital rights management tools, mechanisms to facilitate the payment of royalties, etc.); and
 - d. Enforce their IP rights, including any mechanisms that could mitigate infringement or help ensure compliance with contractual terms associated with the sale of an asset.
7. Please describe how and to what extent copyrights, trademarks, and patents are relied on, or anticipated to be relied on, in your field or industry to:
 - a. Protect assets that are associated with NFTs;
 - b. Combat infringement associated with NFT-related assets offered by third parties; and
 - c. Ensure the availability of appropriate reuse of NFT-related assets.
8. Are current IP laws adequate to address the protection and enforcement of IP in the context of NFTs? If not, please explain why, including any gaps in current IP laws, and describe any legislation you believe should be considered to address these issues.
9. Please describe any IP-related impacts those in your field or industry have experienced in connection with actual or intended uses of NFTs. When relevant, please describe any legal disputes that have arisen in the following contexts, and

the outcome of such disputes, including citations to any relevant judicial proceedings:

- a. The relationship between the transfer of an NFT and the ownership of IP rights in the associated asset;
- b. The licensing of IP rights in the asset associated with an NFT;
- c. Infringement claims when either (i) an NFT is associated with an asset in which another party holds IP rights, or (ii) IP rights in the asset associated with an NFT are owned by the NFT creator;
- d. The type and/or scope of IP protection afforded to the NFT creator, including when that party is not the creator of the associated asset; and
- e. The application of one or more of the exclusive rights under 17 U.S.C. 106 to transactions involving NFTs.

10. Please describe any instances you have observed in which a party has sent or received:

- a. A notification of claimed copyright infringement, counternotice or material misrepresentation, pursuant to 17 U.S.C. 512, in connection with an NFT; and
- b. Other IP-related legal claims seeking the removal or reinstatement of NFT-associated materials.

For each such instance, please describe the nature and outcome of this claim or process, including whether the material was ultimately removed, and if so, whether the material subsequently reappeared. If an infringement or 17 U.S.C. 512(f) action was filed, please provide citations to the court docket and any relevant judicial decisions.

11. Please describe the extent to which adjustments are being made to IP portfolio planning and management in light of the emergence of NFTs.
12. Please describe any experiences in seeking IP protection for, or use of, assets associated with NFTs in foreign jurisdictions.
13. Please identify any additional IP issues associated with NFTs that you believe the Offices should consider in conducting this study.

II. Public Roundtables

The Offices will hold three public roundtables focused, respectively, on copyrights, patents, and trademarks. The roundtables are not expected to address broad topics in cryptocurrency or decentralized systems generally, but rather only IP considerations as they relate to NFTs.

Members of the public interested in participating as a panelist in one or more roundtables must submit such a request to NFTStudySpeakingRequests@uspto.gov and provide their name, professional affiliation, and contact information, and designate the roundtable(s) at which they wish to speak. Such requests must be submitted by the dates listed above (at **DATES**). Please note that written comments should not be submitted to this address; any such comments will not be considered.

The Offices will make every effort to ensure a broad range of stakeholder views are represented on the panels but may not be able to accommodate every request to participate. The Offices may also invite participation from individuals and entities who have not requested to participate. The submission of written comments in response to this notice is not a prerequisite to participation as a panelist in a roundtable.

The Offices will contact individuals selected to participate as panelists at the roundtables for additional information to aid in preparing for the roundtables. A tentative agenda for each roundtable will be posted at <https://www.uspto.gov/ip-policy/joint-study->

intellectual-property-rights-and-non-fungible-tokens and <https://copyright.gov/policy/nft-study> approximately one week before it takes place.

The roundtables will be livestreamed, and the Offices will post a link and instructions for members of the public to register to view them live. The USPTO will host Roundtable 1 (patents) and Roundtable 2 (trademarks). Additional information regarding these roundtables and instructions for registering to view them will be posted at <https://www.uspto.gov/ip-policy/joint-study-intellectual-property-rights-and-non-fungible-tokens>. The USCO will host Roundtable 3 (copyrights). Additional information regarding this roundtable and instructions for registering to view it will be posted at <https://copyright.gov/policy/nft-study>. The roundtables will also be video-recorded and transcribed, and copies of the recordings and transcripts will be available on the above USPTO and USCO websites.

Katherine K. Vidal,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

Dated: November 9, 2022.

Shira Perlmutter,

Register of Copyrights and Director, United States Copyright Office.

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